No. 06-822

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In The
Supreme Court of the United States

CAROLYN G. KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN SUPPORT OF THE PETITION

A. Kochert Satisfied Antitrust Standing, Antitrust Injury and Harm To Competition

Respondents Anesthesiologists Associates P.C. ("AA") and Greater Lafayette Health Services, Inc. ("GLHS") oppose Kochert's Petition as if she either had never introduced expert testimony to substantiate her burden of proof on standing or failed to supply testimony on certain of its elements. Respondents' assertions are incorrect, and their protestations to the contrary reflect a twisted reading of the evidentiary record. As demonstrated throughout the Petition and in the Appendix, particularly as summarized at App. 132-139, Kochert proffered, and the district court found admissible, evidence sufficient to establish every material fact necessary to state a claim for relief under applicable law. It is because Kochert met those minimum requirements that the lower courts' confusion over admissibility and sufficiency standards presents a question that this Court should resolve.

Respondents expend considerable effort arguing that Kochert lacks standing, has not incurred antitrust injury and has failed to show harm to competition. They contend that Kochert fails to present any compelling reason to grant the Petition when well-settled federal law mandates that she demonstrate antitrust standing, antitrust injury and, consequently, whether she is an appropriate party to bring suit according to this Court's requirements. Kochert does not dispute these requirements as part of her burden. Respondents fail, however, to state the obvious: that the requirements of antitrust standing, which are inclusive of having to show antitrust injury and harm to competition (Pet. at 20-21, citing to Areeda and Hovenkamp), must be

shown by proofs. In this instance, the proofs were supplied in the form of substantial, admitted expert testimony.

Respondents make much of the fact that Kochert's experts never testified she was eliminated from competition in anesthesiology in 1998 and was driven from the market before a time, 2001, when they considered the anti-competitive act to have occurred. As made exceedingly clear from Kochert's Petition at 22-24 (App. 132-139), expert Dr. Seaman defined a continuum of events not starting and ending all in 2001, but starting in 1998, when Respondents controlled the markets, eliminating Kochert as a competitor, and culminating in 2001, when Kochert was still ready, willing and able to continue her practice in anesthesia, as late as 2002-2003 (App. 4). This buttresses the undisputed facts that she lived in the market continuously, she had, and continues to have, full and unblemished privileges at GLHS in anesthesiology, expressed a desire to continue in the practice of anesthesiology, and the only reason she could not service patients in anesthesia was due solely to being excluded as a competitor through the operation of the exclusive dealing arrangement between the Respondents. She was forced into another medical practice in her community to "provide food on the table" for her family and to stay in her community without disrupting the lives of her six children, her husband, and, of course, herself.[1] Even if the Respondents disagreed with these premises, there remains a material question of fact

[1] She also cannot be faulted for mitigating her damages, if viewed within a legal framework, by earning income in another medical specialty. Just as it is unnecessary to exhaust administrative remedies when it would be futile, it is, in addition, unnecessary to continue to pursue a practice in anesthesia when another party's antitrust violation has made that futile.

for a jury regarding her standing in 2001 (*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987-988 (D.C. Cir. 1977)) (manifesting an intention to enter the marketplace presents a question of fact for the jury in an antitrust case on these issues), and when anticompetitive activity commenced as part of a continuum.

Second, Respondents argue that Kochert failed to prove harm to competition. Nothing could be further from the truth.[2] As Kochert illustrated, harm to competition is measured in the alternative by diminished quality of care, increased pricing or diminished output arising out of the exclusive arrangement. Pet. at 24-25. Kochert has shown all three through the testimony of her experts. Pet. at 25. Similarly, Kochert was injured from the operation of this arrangement through loss of income from her business – substantiated, once more, by admissible expert testimony. Pet. at 25; App. at 123-124.

While Kochert addressed being a proper party in her Petition (at 23), it bears repeating that being a proper party is the conclusion resulting from substantiating the factors required to establish standing. Kochert has done this with detailed and thorough admitted expert testimony.

Finally, Respondents assert that Kochert lacks standing as a matter of law. That is true only if there are insufficient proofs to support the requisite elements of

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[2] Kochert's proof follows closely the model set forth by Justice O'Connor in *Hyde*: "Exclusive dealing can have adverse economic consequences by allowing one supplier of . . . services unreasonably to deprive other suppliers of a market for their [services] . . . Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of . . . sellers are frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984).

standing, akin to showing causation in a tort case, as Kochert points out. Pet. at 21-22. These proofs consist of admitted expert testimony, shown by Kochert to exist in the record; nowhere did the lower courts ever state that this testimony did not reach all material facts.

B. Lower Federal Courts Have Increasingly Confused Admissibility and Sufficiency

Respondents argue that, "[it] is Kochert, and not the lower courts, who confuses the standards for admissibility and sufficiency", and that the increasingly prevalent melding of admissibility and sufficiency is a phenomenon of "academic" interest only. AA Br. at 8; GLHS Br. at 16. But this admittedly interesting academic issue has enormous practical significance. It muddies the trial process considerably, sowing confusion in at least three areas: the parties' pretrial obligations, district courts' gatekeeping and supervisory responsibilities, and appellate courts' ability to review the bases for the decisions below.

Kochert cites several noted authorities who have commented on this post-*Daubert* confusion. *See, e.g.*, Gavil, *After Daubert: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 Antitrust L.J. 663 (1997). Pet. at 3, 4, 15, 20. Kochert has already identified that Judge Rothstein believes there now exists a "conflict in the circuits" over whether the inquiry under Rule 702 is separate from any inquiry into sufficiency. Pet. at 4, 16, 20.

Moreover, Professor Margaret Berger, possibly the leading evidence and procedure scholar in the nation today, has similarly commented repeatedly on this post-*Daubert* trend. Like Judge Rothstein, Professor Berger's

focus has been on decisions that "incorporate a . . . sufficiency standard into the . . . court's admissibility determination." Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 Law & Contemp. Probs. 289, 322, 325 (2001) ("*Upsetting the Balance*"). Professor Berger noted and discussed this confusion of standards in the opening chapter of the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000). After *Daubert*, she observed, "the benefits of economy and efficiency that accrue when expert proof is considered in the context of admissibility determinations may tempt courts to consider sufficiency when ruling on admissibility." *Id.* at 22.

Judge Rothstein and Professor Berger identified several cases in which admissibility and sufficiency effectively merged, thus creating obfuscation in this area of the law. Berger, *Upsetting the Balance*, at 322 (federal decisions incorporate a state's sufficiency standard into the federal court's admissibility determination) (n. 192, *e.g.*, *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999) ("Because this action is based on diversity, Georgia substantive standards of law must apply. Proffered expert testimony must meet the legal as well as the substantive issues of the case."); *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387, 1398 (D. Or. 1996) ("Under Oregon law, the plaintiffs in this litigation must prove not merely the possibility of a causal connection between breast implants and the alleged systemic disease but the medical probability of a causal connection."); and Rothstein, *Opinion and Expert Testimony . . .*, SL 084 ALI-ABA, at 202-203 (nn. 1591-1601).

As occurred in this case, confusion exists at the two decision points of admissibility and sufficiency. While this

phenomenon occurs more so at the former of these two junctures (importing sufficiency standards into the admissibility judgment), the effect – confusion among litigants and members of the bar – remains the same. The parties are thus left without guidance regarding what is at issue at both junctures, and this practice undermines trial practice by shortchanging the jury's role in the process. This was exactly the lesson of the Second Circuit's decision in *In re Joint Eastern & Southern Dist. Litig. v. U.S. Mineral Products Co.*, 52 F.3d 1124 (2d Cir. 1995) (Pet. at 16), a lesson ignored by the Seventh Circuit here. Whereas the Second Circuit reversed a district court's judgment that had imported *Daubert* gatekeeping principles into its sufficiency evaluation, the Seventh Circuit permitted the district court below to do the same thing. Respondents assert that the Second Circuit's decision does not conflict with the Seventh Circuit's decision. But their assertions are nothing more than that; the Second Circuit reversed the lower court for conflating admissibility and sufficiency analyses; the Seventh Circuit upheld the lower court's conflation of these separate standards. Therein lies the conflict.

The Petition is grounded on the principle that passing the critical review of expert testimony mandated by Rule 702 ordinarily will mean that the summary judgment standard is met.[3] If a court finds otherwise, the Petition argues, it should explain why *Daubert*-worthy evidence is

[3] Respondent AA concedes this point, admitting, "when 'all of the essential parts of a party's case pass *Daubert*, this will virtually always be enough to proceed to trial.'" AA Br. at 7, quoting Petition at 13-14. *See, e.g., Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995) (if the evidence met the *Daubert* criteria, then "the plaintiffs introduced sufficient evidence . . . to present their claim to the jury.").

not sufficient to reach a jury. The Respondents' confusion in this case stems from its myopic understanding of what *Daubert* has wrought. AA, for instance, suggests that *Daubert* heralded a less stringent standard for admitting expert testimony as compared to the general acceptance test of *Frye v. United States*, 293 F. 1013 (1923). AA Br. at 8. This is simply incorrect, as has been recognized by this Court, lower federal courts, and scholars. *See, e.g., Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."); *Wilson v. City of Chicago*, 6 F.3d 1233, 1238-1239 (7th Cir. 1993), as modified on denial of reh'g. (Dec. 8, 1993) ("The elimination of formal barriers to expert testimony has merely shifted to the trial judge the responsibility for keeping 'junk science' out of the courtroom . . . It is a responsibility to be taken seriously."); Cheng & Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 Va. L. Rev. 471, 472 (2005) ("In federal courts . . . *Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely.") *Daubert* and the amendments to Fed. Rule of Evid. 702 raised the standards of proof; they did not lower them.

The *Daubert* threshold is a significant step in the pretrial process, and a party who has successfully overcome its "exacting standards" should reasonably expect that, absent some good reasons to the contrary, she has established material facts that should be resolved by a jury. As the Ninth Circuit on remand in *Daubert* pointed out, the relevancy requirement is inextricably tied to materiality:

> We must ensure that the proposed testimony is "relevant to the task at hand," *Id.* at 2797, i.e.,

> that it logically advances a material aspect of the proposing party's case.

43 F.3d 1311, 1315 (9th Cir. 1995). Admitted expert evidence thus advances material facts, the very facts that are necessary to establish a claim for relief that satisfies the requirements of Rule 56.

The crux of Kochert's position is that the confusion manifest in the lower courts between admissibility and sufficiency is a natural product of the more muscular evidentiary standards explicated in *Daubert*. As noted above, much of the confusion has occurred on the evidentiary side, where courts import summary judgment principles into their admissibility analyses. Indeed, the 2000 amendments to Rule 702 explicitly employed the word sufficiency when they incorporated *Daubert* principles into the Rule itself. Rule 702 requires expert testimony to be "based upon sufficient facts or data." Fed. Rule of Evid. 702. Rule 702's sufficiency requirement is not the same as demanded by Fed. R. Civ. P. 56(c), but it does propel the two rules onto a collision course.

C. Kochert Has Not Waived any "Question Presented"

As a consequence of the persistent melding of admissibility and sufficiency among lower courts, the Petition calls upon this Court to instruct them to "make clear the bases for their rulings." Respondents can hardly object to this proposal, since they strenuously contend that the lower courts gave adequate reasons in this case. Yet AA and GLHS contradict their position by saying Kochert waived the issue of courts having to make clear the bases for their rulings. As shown in the Appendix to this reply,

Petitioner's principle and reply briefs before the Seventh Circuit, as well as post oral argument submissions, are replete with materials relating to an analysis of the confusion surrounding admissibility and sufficiency. Also noted is the district court's failure to opine where Kochert failed to introduce expert testimony regarding any facts that are necessary to make out a claim under applicable law. *See* App., Reply Br. at 6. Additionally, the Respondents' claim that Kochert waived one of her questions to this Court because she failed to raise it before the Seventh Circuit below is incomprehensible. Since a Court of Appeals review of a district court's summary judgment order is *de novo*, Kochert could not have foreseen, without first reading its opinion, that the Seventh Circuit would fail to address why admitted expert testimony did not satisfy the requisite elements of her cause of action.

D. Conclusion

There exists compelling reasons for this Court to grant the Petition. Summary judgment orders are fueled by the principle that no reasonable jury could conclude that the proofs on all elements of the burden of proof are sufficient to find for the non-movant. *See, e.g.*, AA Br. at 8. In ordering summary judgment, the courts below disregarded admitted expert evidence and other proof that unequivocally established material facts in dispute on all elements necessary to state a claim for relief. This anomalous outcome resulted from these courts having conflated admissibility and sufficiency considerations, allowing them to weigh the persuasiveness of Kochert's proof, a task constitutionally left to the jury. This melding of admissibility and sufficiency has become all too frequent among lower courts. The instant case provides this Court

with the opportunity to clarify the standards of admissibility under Fed. Rules of Evid. 702 and the standards for summary judgment under Fed. R. Civ. P. 56(c).

Petitioner, Carolyn G. Kochert, M.D., thus requests that this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc., d/b/a Lafayette Home Hospital, d/b/a St. Elizabeth Medical Center, John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

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ORAL ARGUMENT REQUESTED

* * *

IV. MATERIAL QUESTIONS OF FACT REMAIN FOR A JURY TO DECIDE GIVEN THE OPINIONS OF EXPERT TESTIMONY

This appeal presents the quite bizarre situation in which a district court found expert testimony admissible regarding all material facts in dispute, but granted summary judgment on the basis that no material facts were in dispute. In the case law, summary judgments typically, if not almost exclusively, follow a district court's ruling that a party's expert's opinions are *inadmissible* under Rule 702 and *Daubert*. Here, the district court found the appellant's experts to be both relevant and reliable, yet granted defendants' motions for summary judgment. Given the basic logic of the rules of evidence and procedure, this outcome is nonsensical.

Ordinarily, exclusion of expert testimony means that the offering party has failed to produce admissible evidence regarding a material fact in dispute. *Weisgram v. Marley,* 528 U.S. 440, 443 (2000) (expert testimony found not scientifically sound and speculative is incompetent to prove plaintiffs case). Expert testimony may be excluded because it is either irrelevant or unreliable. In either case, in the absence of other admissible evidence regarding a material fact, summary judgment is appropriate. In effect, therefore, the district court ruled that Kochert's expert evidence was relevant to material facts in dispute and was based on reliable methods and principles, yet not sufficiently "persuasive" to withstand summary judgment. This ruling is illogical on its face, and indicates that the district

court inappropriately weighed evidence when it granted defendants' motions for summary judgment.

As outlined in *Daubert,* and incorporated into amended FRE 702, the admissibility determination is two-fold. First, the court must consider whether the proffered evidence is relevant, or "fits," the case at hand. *Daubert,* 509 U.S. at 591 (*citing United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir. 1985)). This, like most relevancy inquiries, is a logical determination regarding whether the evidence has probative value concerning some material fact. *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II),* 43 F.3d 1311, 1315 (9th Cir. 1995) ("[W]e must ensure that the proposed expert testimony is 'relevant to the task at hand,' i.e., that it logically advances a material aspect of the proposing party's case.") (Citation omitted). The Supreme Court referred to this first prong of the analysis as the "fit" requirement. Rule 401, for instance, defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In *Daubert,* the Court quoted Judge Weinstein and Professor Berger, stating, "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert,* 509 U.S. at 591 (*quoting* 3 Weinstein & Berger ¶ 702[02] at 702-18). In effect, therefore, the determination that expert evidence is admissible indicates that the evidence is material (i.e., "of consequence to the determination of the action"). Moreover, appellate courts must defer to the district court on this issue, absent an abuse of discretion. *General Electric v. Joiner,* 522 U.S. 136, 143 (1997).

The second finding necessary to admissibility is that the basis for the expert opinion is scientifically valid. *Daubert*, 509 U.S. at 590, n. 9 ("In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.") (Emphasis in original). This determination is a "preliminary fact" that must be made "pursuant to Rule 104(a)." *Id.* at 592. Under this standard, then, the district court is charged with determining whether the basis for the proffered expert testimony is scientifically valid, and this matter "should be established by a preponderance of proof." *Id.* at 593, n.10 *(citing Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)), The district court's determination that the basis for expert testimony is sufficiently valid to admit will only be overturned on appeal by a showing of an abuse of discretion. *Joiner,* 522 U.S. at 143.

With its 11-15-04 rulings, the district court found that the expert opinions were relevant to material facts and scientifically valid. On these findings, the appellate court owes deference. Yet, paradoxically, the district court granted summary judgment, notwithstanding this determination that plaintiffs expert testimony was admissible.

Although the evidentiary determination under FRE 702 is not coterminous with the sufficiency determination under FRCP 50(a)(1), there is a logical structure that must pertain to determinations made under these two provisions. The logic is as follows. In order to grant summary judgment, a court must find that there is insufficient evidence on those material facts that are necessary to create a legal claim such that a reasonable jury could not find for the non-moving party on all of those facts. Suppose a single fact, say Fact A, was sufficient to establish a claim under applicable law. If expert testimony was found to be

relevant and reliable on the question of Fact A, this, by necessity, would be sufficient to avoid summary judgment. In this situation, the finding that the expert testimony is "relevant" is tantamount to saying that there is a material fact in dispute. *See Daubert II,* 43 F.3d 1311, 1315 (9th Cir. 1995) ("[W]e must ensure that the proposed expert testimony is 'relevant to the task at hand,' *i.e.*, that it logically advances a material aspect of the proposing party's case.") (Citation omitted). This conclusion is buttressed by the fact, as noted above, that admissibility is established by the preponderance of the evidence standard, whereas summary judgment is proper under the less demanding standard that no reasonable jury could find the fact in issue.

To be sure, the admissibility determination is not identical to the issue presented by summary judgment. The former involves whether the empirical basis for the expert opinion is more likely than not valid, whereas the latter asks whether a reasonable jury could find that Fact A is established by a preponderance of the evidence. But there is an obvious correspondence between the two. If an expert opines that Fact A exists, and the court has found that this opinion is, more likely than not, based on valid methods and principles, it would indeed be the highly unusual case in which the admission of the opinion would not be enough to avoid summary judgment. And this appears to be exactly the situation in the case law. Although it is difficult to prove a negative, a thorough review of the case law has failed to uncover any cases in which a court found that expert testimony was both relevant and reliable regarding material facts, but that summary judgment was then appropriate. This review demonstrates dearly that the ordinary course of events is that summary

judgment follows *exclusion* of expert testimony, not its admission.

This basic analysis is true more generally as well. If, for example, expert evidence is admissible regarding Facts A, B, and C, and these three facts are necessary to make out a claim under applicable law, then once again the decision to admit the evidence compels the conclusion that summary judgment is improper. As a matter of logical necessity, therefore, the only situation in which summary judgment would be appropriate is if there is no admissible evidence, expert or otherwise, on a particular fact that is necessary for stating a legal claim. For example, if expert testimony is admitted only as regards Facts A, B, and C, but Facts A, B, C, and D are necessary to create a claim under applicable law, summary judgment would be appropriate. Equally true is that expert opinion testimony should not be admitted if it is contrary to prevailing law, or connected to existing data only by the *ipse dixit* of the expert. *Joiner*, 522 U.S. at 146. While this did not occur here, it is nonsensical to believe the district court would find admissible opinions based on data or methodology not deemed acceptable by the prevailing law of this circuit.

In this case, too, there is no suggestion that Kochert failed to introduce expert testimony regarding any facts that are necessary to make out a claim under applicable law. Indeed, the contrary is true. For example, in his 11-15-04 *Daubert* order on Seaman (R. 392), the district court ruled that, "**Dr. Seaman's testimony, defining the product and geographic markets, is not only relevant to this case, but is a central issue**," (at 2) (emphasis added). Given its determined reliability, how is it possible that this expert's evidence is not sufficient to create a dispute over a material fact? The district court

essentially answers this query by stating that its admissibility decision "did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact." *Kochert,* 372 F.Supp.2d at 512-13. But the district court believed only it could only adjudicate persuasiveness ("It will be necessary for this court to wade through that problem [ultimately persuasive] . . . during summary judgment . . . " 11-15-04 Order at 1, R. 393).

The first ground here is, simply put, an inappropriate basis for granting summary judgment District courts cannot weigh the evidence; this is a task for the jury here. *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655 (7th Cir. 2002) (warning against the "trap" of weighing conflicting evidence – "the job of the jury"); *Smith v. Ford*, 215 F.3d 713, 719 (7th Cir. 2000) (Question of whether the expert is credible or whether his theories are correct is a factual one left for a jury.) (District court is limited to determining whether expert testimony is pertinent to an issue and whether the methodology underlying that testimony is sound.); and *Ritchie v. Glidden* 242 F.3d 713, 723 (7th Cir. 2001) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment . . . ") (citation omitted).

The second ground, sufficiency, is properly a component of summary judgment, but it cannot conceal what appears to have occurred in this case – the district court's weighing of the evidence on conflicting geographic markets and other material issues. The district court concluded that the geographic market included hospitals in Logansport and Lebanon, as well as facilities in other cities, and used drive times to support that conclusion. 372 F.Supp.2d

at 518. This was not Seaman's testimony at all, yet the district court found Seaman's data and methodology sound, relevant and reliable. Indeed, the admissibility determination under Rule 702 necessitates the finding that proffered testimony be "based on *sufficient* facts or data," be "the product of reliable principles and methods," and have been "applied . . . reliably to the facts of the case." Fed. R. Evid. 702 (emphasis added). Once again, notwithstanding the district court's statements to the contrary on how it viewed a geographic market, for example, the admissibility determination largely, if not completely, resolved the question of the existence of a genuine issue of material fact. *The admission of the expert testimony created genuine issues of material fact.*

Finally, this court is obligated to give deference to the district court's admissibility determination, but, to reiterate, review its grant of summary judgment *de novo*. This gives Kochert's arguments considerable procedural force. The district court's judgment that Kochert's experts' testimony is relevant to material facts, and that the basis for their opinions is scientifically valid, can only be overturned if it abused its discretion. After extensive briefing in this case on *Daubert* issues (29 docket entries),[12] including the parties' analyses of this circuit's decisions,[13] and two days of extensive oral arguments[14], such abuse surely should not be found by this court. At the same time,

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[12] Dkt. Entries 290-293, 296-299, 302-303, 308-309, 325-328, 342-347, 350, 353, 360, 368.

[13] Dkt. Entries 365-367 (briefs totaling 120 pages without exhibits).

[14] They seemed more like hearings on motions for summary judgment. *See* transcript of arguments in Supp. App. at 28, 40, A-1, A-2, R. 428, 429.

however, this court reviews the district court's summary judgment order *de novo,* and thus must consider whether a genuine issue of material fact exists in this case. The admitted expert testimony creates such genuine issues. In effect, what must be a given of the district court's findings (i.e., the admissibility of Kochert's experts), provides the full explanation for overturning the district court's grant of summary judgment. *See Spirit v. Northwest*, ___ F.3d ___ 2005 WL 2990632, *10 (6th Cir. 2005) (reasonable and reliable expert opinion defeats summary judgment).

V. MATERIAL QUESTIONS OF FACT REMAIN AS TO CONTINUUM OF EVENTS/ANTITRUST STANDING, AND ANTITRUST INJURY

In an antitrust case, events are to be viewed, not in a vacuum or in isolation, but as a continuum, looking at the sequence, or whole, of events in determining anticompetitive behavior. *Aspen Highlands v. Aspen Skiing Co.,* 738 F.2d 1509 (10th Cir. 1984), *aff'd.,* 472 U.S. 585 (1985); *Continental Ore Co. et al. v. Union Carbide Co., et al.*, 370 U.S. 690, 693-695, 699 (1962); *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655-56 (7th Cir. 2002); and *City of Mishawaka, et al. v. Am. Electric Power Co., Inc.,* 616 F.2d 976, 986 (7th Cir. 1980) (reversing the

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1196

Carolyn G. Kochert, M.D.

Plaintiff-Appellant,

v.

Greater Lafayette Health Services, Inc., d/b/a Lafayette Home Hospital, d/b/a St Elizabeth Medical Center, John Walling and Anesthesiology Associates, PC

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
The Honorable Allen Sharp

No. 4:01cv0027

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT CAROLYN G. KOCHERT, M.D.

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* * *

benefit of competition in anesthesia services at either hospital or between the two hospitals. Though not gone from anesthesiology, Kochert commenced an alternative, but fledgling, medical practice in pain management starting in the fall, 2000 (12/01/03 dep. (138)) because she recognized defendant AA, with the active collaboration of GLHS, was monopolizing the market for her preferred (and more profitable) business, anesthesia. Moreover, the evidence establishes that the exclusive contract in this relatively isolated market has had, and will continue to result in reduced quality, decreased quantity and increased real prices for anesthesia services.

I. EXPERT TESTIMONY ESTABLISHES MATERIAL QUESTIONS OF FACT

The standards of appellate review are clear and lack controversy in this matter. After two days of hearings and based on over 250 pages of pleadings from the parties on *Daubert* issues, the district court concluded that Kochert's experts' opinions were admissible. Unless the district court misapplied the *Daubert* framework, which there is no indication is the case here, this court will not disturb the district court's findings unless they are manifestly erroneous. *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); *Mihailovich v. Laatsch,* 359 F.3d 892, 918 (7th Cir. 2004). Despite finding Kochert's experts admissible, however, the district court granted the defendants' motions for summary judgment, finding that her experts' opinions were not adequately "persuasive." This conclusion is reviewed on appeal *de novo,* and all facts are construed in favor of the non-moving party. *Dukin v. Equifax Check Services, Inc.*, 406 F.3d 410, 414 (7th Cir. 2005); *see Turner v.*

J.V.D.B. & Assoc., Inc., 330 F.3d 991, 994-995 (7th Cir. 2003). From these two non-controversial premises an exceedingly interesting, albeit not especially difficult to resolve, question arises regarding the association between rules of admissibility and standards of sufficiency.

As discussed at length in Kochert's principal brief, the situation in which both expert testimony is admitted and summary judgment is granted is a rare one. There appear to be four basic situations in which this occurs. It happens (1) when the expert testimony is contrary to prevailing law (*Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998)); (2) when admissible expert testimony or other competent evidence is not offered on a fact that is required to be proven under applicable law (*Barnes v. The Kerr Corp.*, 418 F.3d 583 (6th Cir. 2005)); (3) when the evidentiary rules are relaxed, as is true in a bench trial (*Smith-Kline Beecham Corp. v. Apotex Corp.*, 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003) (Posner, J., presiding) ("In a bench trial it is an acceptable alternative to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled.")); *see also Bradley v. Pickens Brown*, 852 F.Supp. 690, 700 (N.D. Ill. 1994); and (4) when the non-moving party's expert opinion is *admissible* to prove relevant facts but not *sufficient* to create a "material fact in dispute." It is this fourth circumstance that appears to divide Kochert and defendants and so will be the main focus of this section.

This fourth circumstance, as a practical matter, largely does not occur in practice. Contrary to defendants' mistaken impression, Kochert's argument that this situation does not occur is not a product of any confusion between admissibility rules and sufficiency standards. It is based on the fact that a well applied *Daubert* analysis will

operate to provide the information on which a sufficiency judgment must be made. The basic operating premises of the *Daubert* trilogy – *Daubert, Joiner,* and *Kumho Tire* (and now codified in Rule 702) – make plain the interconnectedness of the rules of admissibility and the standards of sufficiency.

Unfortunately, defendants' briefs display a deplorable lack of understanding of the basic lessons and principles of the *Daubert* trilogy. Admissibility judgments after *Daubert* and amended Rule 702 are substantially more than perfunctory checks on the methods and principles that lie at the base of proffered expert opinion. *See generally,* FAIGMAN, *ET AL.,* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, §§1:6-1:23 (Thompson/West 2005-2006 ed.); Margaret Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, 38 (Federal Judicial Center, 2d ed. 2000). *Daubert* made clear that the basis for an expert's opinion must be both relevant to a material fact in dispute and scientifically valid. As the *Daubert* Court made plain, relevancy means "fit." *Daubert,* 509 U.S. at 591; *Wintz v. Northrop Corp.,* 110 F.3d 508, 512 (7th Cir. 1997) (expert testimony must "fit" the case by assisting the trier of fact in understanding the issues). Judge Kozinski explained the principle succinctly, stating that the fit requirement obliges district courts to "ensure that the proposed expert testimony is 'relevant to the task at hand,' *i.e* that it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II),* 43 F.3d 1311, 1315 (9th Cir. 1995). Thus, the defendants' concession that the district court found the *Daubert* relevancy requirement to have been met effectively accepts the proposition that Kochert's

experts' opinions fit material or consequential facts in the case. *Daubert*, 509 U.S. at 591; *see also* BLACK'S LAW DICTIONARY, at 998 (defining "material" as "[h]aving some logical connection with the consequential facts").

The defendants' misunderstanding of the *Daubert* trilogy is even more striking in regard to the second prong of the analysis, evidentiary reliability. Defendants' briefs argue that the *Daubert* court limits district court gatekeeping to the methods and principles supporting the experts' opinions, and that the gatekeeping function does not include consideration of how the evidence is to be used. AA's brief states that while Kochert's experts "met the . . . reliability standards under *Daubert,*" this was based "solely on principles and methodology, not on the conclusions [the experts] gēnerate[d]." AA Br. at 16. This careless recitation of *Daubert's* language entirely fails to capture the true import of *Daubert's* reliability demands. Defendants' argument leaves out the more central aspects of the *Daubert* trilogy, especially as set forth in *Joiner.* It would make no sense in scientific discourse to consider methods and principles underlying research without considering the uses to which the data are to be put. An animal study of the effects of second-hand smoke, for instance, might be perfectly appropriate methodologically, but might not support expert opinion that second-hand smoke causes cancer in humans. In *Joiner,* Chief Justice Rehnquist explicitly recognized the obvious interconnectedness between the methods and principles of a research program and the uses to which those data are to be put in court. He explained that, "conclusions and methodology are not entirely distinct from one another." *Joiner,* 522 U.S. at 146. He then added one of the most quoted lines of the *Daubert* trilogy, that " . . . nothing in *Daubert* or the Federal Rules

of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." *Id.; see also Zenith Electronics Corp. v. WH-TV Broadcasting Corp.,* 395 F.3d 416, 420 (7th Cir. 2005) (quoting *Joiner's ipse dixit* language). Contrary to defendants' apparent belief, there is no easy division establishing methods and principles as an evidentiary concern and the conclusions offered in court as a subject of sufficiency.

Despite defendants' weak attempts to the contrary, the district court's admission of Kochert's experts signified that court's view that relevant and reliable evidence was admissible on material facts in dispute. As discussed at length in Kochert's principal brief, admission of expert opinion on disputed facts creates a logical imperative that leads ineluctably to the conclusion that summary judgment was improper in this case.

Clearly, however, as defendants' briefs point out, it is possible for expert opinion to be admitted but, nonetheless, for summary judgment to be granted against the party that proffered that expertise. GLHS and AA rely on the same four cases, *Barnes, Bailey, Morgan,* and *Rebel Oil,* to substantiate their view that the district court acted properly when it found Kochert's experts' opinions to be relevant and based upon sound methodologies, but granted their motions for summary judgment. These cases do not support what the district court did. In none of the four cases that defendants rely upon did the court hold that summary judgment was properly invoked as regards disputed facts on which the non-moving party's experts had been admitted.

In *Barnes,* the Sixth Circuit found that, despite the admissibility of the non-moving party's experts, he had failed to establish a required element of his proof – causation – and that, in any event, the numerous warnings provided by [the moving party] " . . . were adequate as a matter of law." *Barnes,* 418 F.3d at 591. Defendants' use of *Bailey* is similarly inappropriate, since the trial court there had found the proffered expertise to be inadmissible (*Bailey,* 284 F.3d at 1246), and the Eleventh Circuit itself found the expert opinion to be inconsistent with facts that were not controverted. *Id.* at 1255.

The remaining two decisions, *Morgan* and *Rebel Oil,* present closer cases regarding defendants' claim. In *Morgan,* the Eighth Circuit initially noted that the district court had granted summary judgment without reaching the moving party's objections to the opponent's expert testimony. *Morgan,* 380 F.3d at 463. The Eighth Circuit, however, surmised that the district court had been troubled by methodological weaknesses in the non-moving party's expert testimony concerning certain regression analyses conducted – an admissibility consideration. The *Morgan* court then proceeded to review the lower court's ruling *de novo,* since no admissibility determination had been made below, and affirmed the lower court's summary judgment ruling. Only in passing did the court observe, "[ad]missible regressions . . . do not mean summary judgment is inappropriate." 380 F.3d at 468. To support this statement, the Eighth Circuit quoted *Daubert,* in which the court had stated, "[i]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment. . . . "

Id. [*Daubert,* 509 U.S. at 596.] Such a state of affairs was not presented in *Morgan* and is not the case here. Indeed, the district court here found that Kochert's experts' testimony all met the preponderance of evidence standard without even a mention of their constituting a "scintilla of evidence" not being able to meet a sufficiency hurdle.

The final decision of the four that defendants' extensive searching uncovered is *Rebel Oil.* In that case, as defendants contend here, the moving party argued that the district court acted properly in finding that the nonmoving party's expert testimony was admissible, but that summary judgment was nonetheless appropriate. *Rebel Oil,* 146 F.3d at 1096-97. A closer look at *Rebel Oil,* however, indicates that, like *Barnes,* the case illustrates the circumstance when the complaining party is unable to establish a required element of his proof and thus the expert testimony is not sufficient as a matter of law. 146 F.3d at 1097; *see Rebel Oil Co. v. Atlantic Richfield,* 957 F. Supp. 1184, 1202 (D. Nev. 1997) (expert's measurement of marginal cost of gasoline contrary to law (509 U.S. at 223)).

Moreover, the defendants rely on the methodology/conclusions distinction as it was discussed in *Rebel Oil* to support the bright line they seek to establish between admissibility/sufficiency. It is true that *Rebel Oil* quotes *Joiner* to buttress its dicta that, "[a]n expert witness maybe qualified to testify even though the expert's conclusions are legally incorrect." *See* AA Br. at 16. But the *Joiner* language that the Ninth Circuit and defendants rely upon to define their sufficiency analyses for purposes of summary judgment, in fact, defines the *admissibility standard* under *Daubert.* When a court concludes that "there is simply too great an analytical gap between the

data and the opinion proffered," there is "nothing in either *Daubert* or the Federal Rules of Evidence [that] requires a district court to *admit* [that] opinion evidence." *Joiner*, 522 U.S. at 146 (emphasis added). It is the defendants, not Kochert, who have confused admissibility determinations and sufficiency standards.

Although it is also theoretically possible for a court to *admit* expert testimony on a given set of facts, yet grant summary judgment because that testimony is not *sufficient* for a reasonable trier of fact to find those particular facts in accordance with that expert opinion, such a situation is likely to be exceedingly rare. Indeed, as a practical matter, it does not occur. And for good reason. The admissibility determination establishes that for the facts on which the experts' opinion is offered, the testimony is both relevant (*i.e.*, fits the legal dispute at hand) and reliable (*i.e.*, is based on scientifically valid methods and principles that can support the proffered opinions). Hence, under the *Daubert* trilogy, the decision to admit expert opinion is a declaration that the opinion is based on valid scientific methods and principles, and that the opinion fits the material facts to which it is directed. The district court made just such a declaration below. To grant summary judgment in the teeth of this admissibility determination, regarding the very facts on which the expert opinion has been admitted, indicates manifest confusion concerning the interconnectedness of admissibility determinations and sufficiency judgments. Expert opinion that meets the rigors of the *Daubert* test relating to specific facts in dispute will invariably be sufficient to avoid summary judgment regarding those factual issues. This analysis does not, as defendants claim, confuse admissibility and sufficiency. Quite the contrary is true. It

places proper emphasis on the relationship between admissibility and sufficiency. The admissibility determination provides the grist for sufficiency's mill. The defendants' argument effectively invites trial courts to weigh admitted expert testimony on disputed facts, and thus invade the province of the jury, just as happened here.

II. KOCHERT HAS ANTITRUST STANDING AND HAS SUSTAINED ANTITRUST INJURY

As a result of the district court's *Daubert* rulings, Seaman's opinion on the time period to commence anti-competitive behavior is sufficient to have a jury consider it; so, too, is his opinion that a continuum of events,[3] consistent with prevailing antitrust legal doctrine, is now ripe for a trier of fact to weigh. The events must then be measured from 3/1/98, as Seaman opines, taking into account that

* * *

[3] GLHS states the district court did not focus on one single (isolated) event. GLHS Br. at 5. If so, the district court weighed Seaman's opinion on continuum and disregarded it, favoring its own views on the events. Such weighing is not permitted by this circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 05-1196

CAROLYN KOCHERT, M.D.	) **Appeal from the**
Plaintiff-Appellant	) **United States**
	) **District Court for the**
v.	) **Northern District of**
	) **Indiana, Hammond**
GREATER LAFAYETTE HEALTH SERVICES, INC., JOHN WALLING and ANESTHESIOLOGY ASSOCIATES, P.C.	) **Division at Lafayette**
	) **Federal Court**
	) **No. 4:01CV0027AS**
Defendants-Appellees.	)

NOTICE TO COURT TO ADDRESS INACCURACIES IN ORAL ARGUMENT

Comes now this plaintiff-appellant, Carolyn Kochert, M.D. ("Kochert"), by her counsel, Miles J. Zaremski and Alon Stein of Kamensky Rubinstein Hochman & Delott, LLP, and files this Notice to Address Inaccuracies in Oral Argument.[1] In support thereof, Kochert states as follows.

Oral argument proceeded in this matter on February 13, 2006 before the Hons. Michael S. Kanne, Terence T. Evans and Anne Claire Williams. During the oral argument, Judy Woods, attorney for defendant-appellee,

[1] This filing is pursuant to direction received from the court clerk's office on February 15, 2006. Should it be more appropriate to present the substance of this pleading via a motion, counsel will proceed with one upon direction from the court.

Anesthesiology Associates, P.C., stated to the court as follows:[2]

* * *

> . . . Part of the problem here and you heard it this morning, from Mr. Zaremski himself, is that Mr. Zaremski is attributing the relevancy standard under *Daubert* to say that it is relevant to a material fact and therefore once relevancy has been established under *Daubert*, there is a material fact at issue. In fact, **the relevancy standard under *Daubert* doesn't even mention materiality.** It's much broader than that. And in fact we know from numerous cases decided under *Daubert* and its progeny that in fact an expert may opine as to many things in a case that are not material, that are not outcome determinative and what we have here is a leaping over that critical distinction between the relevancy standard in *Daubert* and the sufficiency standard in a summary judgment case particularly a case involving antitrust where there is a long history of federal jurisprudence and Supreme Court cases that say that district court judges in antitrust cases have an even greater burden to test the sufficiency of the evidence and that is exactly what we have here. **So it is that critical misunderstanding that relevance and *Daubert* means materiality** that has led to part of the problem here. Now, what what we also have here is the difference and the something that's pointed out in the Joiner case, that relevancy means fit. Again, **the appellant has attributed that to**

[2] Transcribed by Ramona Washington, a secretary in the law firm for Kochert, on February 15, 2006. See Affidavit, attached.

> **mean that once that fit is defined for purposes of the *Daubert* test as the district court did in this case, that there is a material fact in dispute. It does not mean that,** it is not what *Joiner* holds and that is not what we have here.
>
> * * *

26:21 – 28:16, Oral Argument Recording, ca.uscourt.gov. (Emphasis added.)

Daubert v. Merrell Dow, 509 U.S. 579, 481 (1993) states:

> Rule 702 further requires that the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a **fact in issue**.' This condition goes primarily to **relevance**. **'Expert testimony which does not relate to any issue is not relevant** and, ergo, non-helpful.' (citation omitted) ('An additional consideration under Rule 702 – and another **aspect of relevancy** – is whether expert testimony proffered in the case is sufficiently **tied to the facts of the case** that it **will aid the jury in resolving a factual dispute**'). The consideration has been aptly described by Judge Becker as one of '**fit**'. *Ibid.*" (emphasis added.)

Daubert v. Merrell Dow, 43 F. 3rd 1311, 1315 (9th Cir. 1995) (Daubert "II"), states:

> We must ensure that the proposed expert testimony is "relevant to the task at hand," *Id.* at 2797, i.e., that it logically advances a **material** aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the "**fit**" requirement. *Id.* at 2796. (emphasis added.)

General Electric v. Joiner, 522 U.S. 136, 146 (1997) states,

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in *Daubert* . . . requires a district court to **admit** opinion testimony which is connected to existing data by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion offered. (second emphasis added.)

As a result of the above, defendant's counsel was inaccurate in telling this court during oral arguments that *Daubert* does not equate a finding of relevancy with materiality and issues in fact to aid the jury in resolving factual disputes.

Respectfully submitted,

CAROLYN G. KOCHERT

By: /s/ Miles J. Zaremski
One of Her Attorneys

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February 27, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission:
Relevency/Materiality Under Daubert

Judge Williams inquired of appellant's counsel during oral arguments on February 13, 2006 whether an admissibility ruling under *Daubert* means there is a finding of a material fact, (Recording of Oral Argument at 4:40 – 5:10), and whether summary judgment is rejected because there has been a material fact (5:32 – 5:49). The following cases, not previously cited, are provided to specifically answer these inquiries, *viz*, that a finding of relevancy under *Daubert* equates to determining a material fact in question; that sufficiency is the collective weight of material facts found admissible; and to preclude summary judgment facts must be disputed and material.

Flanagan v. Altria Group, Inc., 2005 WL 2769011, *2 (E.D. Mich. 2005) (expert testimony is relevant when it will assist the trier of fact in determining a material fact in question).

CFM Communications, LLC v. Mitts Telecasting Co., 2005 WL 2562651, *7 (E.D. Cal. 2005) (quoting *Daubert).*

Friend v. Time Manufacturing Co., 2005 WL 2484643 *2 (D. Ariz. 2005) (quoting *Daubert II).*

Phillips v. Water Bay Management Corp., 2002 U.S. Dist. LEXIS 7209, *7 (2002 DC Virg. Isl.) (relevant and admissible testimony lends sufficient materiality to withstand summary judgment).

Iwanaga v. Daihatsu America, Inc., 2001 WL 1910564, *12 (W.D. Tex. 2001) (summary judgment denied where reliable and relevant expert testimony established material facts).

Petitt v. Celebrity Cruises, Inc., 153 F. Supp.2d 240, 249 (S.D. N.Y. 2001) (expert testimony relevant, as conclusions are material).

–

In Re Joint Eastern & Southern District Asbestos Litigation, 52 F.3d 1124, 1132-1133 (2d Cir. 1995); *H E Stevenson v. E I DuPont,* 327 F.3d 400, 407 (5th Cir. 2003); *Adams v. Indiana Bell,* 2 F. Supp.2d 1077, 1112 (S.D. Ind. 1998); *Tyler v. Sterling Drug,* 19 F. Supp.2d 1239, 1243 (N.D. Okla. 1998) (sufficiency goes to weight of material facts found admissible viewed without judging credibility or weighing the evidence).

–

JPM, Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270, 273 (7th Cir. 1996) (Evans, J.) (to preclude summary judgment a fact must not only be genuinely disputed, but material; material fact effects outcome of case under governing law).

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
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March 14, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: *Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.*
Dkt. No.: 05-1196

Correction to March 13, 2006 FRAP 28(j), Circuit Rule 28(e) Submission

Dear Mr. Agnello:

On March 13, 2006, Appellant tendered the citation of *Frismer v. Upjohn Co.,* cited therein as 1995 WL 390059, *2, 3 (N.D. Ill. 1995 (unpubl.)), in a FRAP 28(j) submission (copy attached). This was an incorrect citation. The correct citation is ***Grismer v. Upjohn Co.,*** 1995 WL 390053, *2, 3 (N.D. Ill. 1995 (unpubl.)).

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

cc: Judy Woods, Esq.
Stephen Pennell, Esq.

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March 13, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality | under *Daubert Decision Within Seventh Circuit*

Judge Williams inquired of appellant's counsel at oral argument on February 13, 2006 as follows:

> "Yeah, but, when we get back to the Daubert ruling, this was just an admissibility ruling. And I agree the court said that it was relevant for purposes of the proceeding, but that doesn't mean that the court has to find there is a material fact, a material fact in dispute just because you meet that preliminary threshold under Daubert." (Recording of Oral Argument at 4:48 – 5:10);
>
> "But you aren't even able to find any cases that support your theory that just because a court makes that finding of relevance that that of necessity dictates a finding, a rejection of summary judgment because there has to be a material fact. You don't have any authority that goes that far, do you?" (Recording of Oral Argument at 5:32 – 5:49).

On February 27, 2006, Appellant's counsel tendered an FRAP 28(j) submission containing 11 cases to respond to these inquiries. This court allowed this filing to become part of the docket in this case on March 7, 2006.

Appellant did not list a decision by a court within this circuit in its February 27, 2006 submission. Consistent with the cases listed in that submission, further research reveals *Frismer v. Upjohn Co.,* 1995 WL 390059, *2, 3 (N.D. Ill. 1995 (unpubl.)) ("If the opinions [of plaintiff's experts under *Daubert*] are determined to be admissible, [movant's] motion for summary judgment will fail as plaintiff's [sic] will have raised a genuine issue of material fact") ("Unless [movant] can keep out plaintiff's experts' testimony, such testimony presents a genuine issue of material fact.")

Very truly yours,

KAMENSKY RUBINSTEIN
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/s/ Miles J. Zaremski
Miles J. Zaremski

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cc: Judy Woods, Esq.
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April 3, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality under *Daubert*

During oral argument on February 13, 2006, Judge Williams questioned the undersigned regarding the relationship among the relevancy standard under *Daubert,* materiality, and material issues of fact for a trier of fact when considering a motion for summary judgment. Her Honor also inquired about cases supporting Appellant positions. Besides decisions contained in Appellant's briefs, the undersigned tendered two Rule 28(j) submissions, one on February 27, 2006, and another on March 13, 2006 (as corrected for typographical errors in the citation on March 14, 2006). Both submissions were allowed for filing as part of the docket on March 7, 2006 and March 14, 2006, respectively. The cases in these submissions (equating relevancy under *Daubert* with materiality and "fit" to the relevant issues, and requiring admitted expert testimony to overcome a summary judgment) came from federal district courts within the 2nd, 3rd, 5th, [6th,] 7th, [9th] and 10th Circuits. The case cited below is significant in that it comes from a federal *circuit* court (ten and twelve years after the U.S.S.Ct. decision in *Daubert* and *Daubert II* (9th Cir.)) and reflects the conclusions in the district court decisions contained in the previously docketed 28(j) submissions regarding the relationships inquired into by

Judge Williams. The case cited below reinforces the language and propositions of the earlier submitted district court decisions and sheds further light on the relationships inquired into by Judge Williams at oral argument on February 13th.

The case is *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878 (10th Cir. 2005).

In n. 3, at p. 883, the 10th Circuit stated in *Norris*, "... in determining whether there was a genuine issue of material fact to overcome Baxter's summary judgment motion, it was necessary for the district court to assess the admissibility of Plaintiff's experts under *Daubert*."

In n. 4, at 884, the Court recognized, "Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances a material aspect of the case. *Daubert v. Merrell Dow*, 43 F.3d 1311, 1315 (9th Cir. 1995) (on remand)."

Very truly yours,

KAMENSKY RUBINSTEIN
HOCHMAN & DELOTT, LLP

/s/ Miles J. Zaremski
Miles J. Zaremski

MJZ/rdw
cc: Judy Woods, Esq.
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April 5, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission: Admissibility/relevancy/materiality under *Daubert*

Dear Mr. Agnello:

This letter brings to the attention of the court two other pertinent and significant authorities that have come to Appellant's counsel's attention after oral argument per FRAP 28(j).[1] In FRAP 28(j) submissions,[2], Appellant's

[1] Oral arguments proceeded on February 13, 2006.

[2] Appellant's counsel recognizes that this is the 4th FRAP 28(j) submission since oral arguments that have brought pertinent and significant cases to the court's attention on the same, exceedingly important issue. Appellant's counsel is doing so, in good faith, and not to otherwise add unnecessary docket entries to this case, in order to

(Continued on following page)

counsel has brought to this court's attention federal case law arising out of, or in, the 2d, 3d, 5th, [6th,] 7th, 9th and 10th circuits. The following cases now come from federal district courts in the 11th Circuit, and were decided subsequent to the oral arguments in this case.

The cases are *Leathers v. Pfizer, Inc. & Warner-Lambert Co.,* 2006 U.S. Dist. LEXIS 11381 (N.D. Ga. (March 10, 2006)) and *Dukes v. Georgia,* 2006 WL 839403, *7, 12, 33 (N.D. Ga. (March 30, 2006)) (testimony is relevant when it advances a material aspect of the proposing party's case, described as "fit"; admitted expert testimony assists the jury and is therefore relevant; and without admitted expert testimony, summary judgment is appropriate).

At *12 in the *Leathers* opinion, the court states, " . . . the last factor requires that the expert opinion be **relevant** to the facts of the case. In other words, there must be a valid scientific connection to a **material** issue in the case. See Daubert, 509 U.S. at 591 (explaining that this final element requires a "fit" between the expert opinion and the facts of the case)." (Emphasis added). At *43, " . . . 'medical expert testimony [is] essential to prove causation in this case.' Defendants' Motion for Summary Judgment is premised upon the argument that Plaintiff has not presented admissible expert testimony establishing causation. The Court agrees."

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honor his obligations of representing his client zealously within the boundaries of the law and, as a member of this court's bar, to provide assistance with its inquiries made at oral argument.

Very truly yours,

KAMENSKY RUBINSTEIN
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/s/ Miles J. Zaremski
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May 10, 2006

Mr. Gino J. Agnello
Clerk, United States Circuit Court of Appeals
Seventh Circuit
219 S. Dearborn Street
Chicago, Illinois 60604

Re: Carolyn Kochert, M.D. v. Greater Lafayette Health Services, et al.
Dkt. No.: 05-1196

FRAP 28(j), Circuit Rule 28(e) Submission Pursuant to Court's April 14, 2006 Order: Admissibility of Expert Testimony Encompassing Sufficiency to Overcome Summary Judgment

Dear Mr. Agnello:

On April 14, 2006, this Court issued an order in which any further [28(j)] submissions to be filed must concern a relevant published authority unavailable at the time of oral argument. Oral argument proceeded on February 13, 2006.

The decision in *Reid v. BMW of North America*, ___ F. Supp.2d ___, 2006 WL 1207923, * (N.D. Ga. (May 1, 2006)) is brought to the court's attention.

1. This decision was unavailable at the time of oral argument, having been decided May 1, 2006.

2. It is to be published (designated by the reference to "F. Supp.2d").

3. Its relevancy follows, below.

A relevant issue is whether the lower court, following a *Daubert* challenge, committed reversible error by first admitting all the testimony of Appellant's four challenged experts on all material facts essential to Appellant's burden, but then granting Appellees' motions for summary judgment because it either was not persuaded by the experts' opinions or their testimony was insufficient to create a genuine issue of material fact. 372 F.Supp.2d 509, 512-513 (N.D. Ind. 2004). Appellant also first raised this issue, conflation of sufficiency and admissibility, in her main brief (at pp. 28-32) and reply brief (at pp. 9-10).

In *Reid,* Senior Judge Shoob admitted plaintiff's expert testimony following a *Daubert* challenge while defendants' motions for summary judgment were pending. The court defined a fact as "material" when controlling substantive law identifies it as an essential element to the non-movant's case, and an issue as "genuine" when the

evidence, taken as a whole, is such that a reasonable, or rational, jury could return a verdict for the non-movant. *Id.* at *4.[1] The admitted expert testimony constituted sufficient evidence to substantiate material facts and to establish genuine issues, thus defeating the summary judgment motions. *Id.* at *4-6.

Reid is also relevant to the instant case because it shows that admitting relevant and reliable expert testimony on disputed facts satisfies the sufficiency requirement necessary to overcome summary judgment.

Very truly yours,

KAMENSKY RUBINSTEIN
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/s/ Miles J. Zaremski
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[1] See *Scaife v. Cook County, et al.*, Dkt. No. 04-2966 (7th Cir. May 10, 2006), *Slip Op.* at 6.